In the Supreme Court of the United States

OCTOBER TERM, 1975

NO. 75-818

GILBERT LUNA AND LARRY KOPP, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioners contend that the court of appeals exceeded its proper scope of review in vacating the district court's order granting suppression of evidence and that the court of appeals prescribed an erroneous legal standard to be applied by the district court on remand if warranted by its findings of fact.

Petitioners were indicted in the United States District Court for the Eastern District of Michigan for conspiring to use and for using extortionate means to collect a $63,900 debt, in violation of 18 U.S.C. 894. Prior to trial, the district court suppressed evidence of these offenses that had been obtained during a court-authorized wire interception (Pet. App. B).[1] On the government's appeal,

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[1]The district court also denied the government's motion for rehearing (Pet. App. C).

the court of appeals vacated the suppression order and remanded for further proceedings in accordance with its opinion (Pet. App. A; 525 F.2d 4[1]

1. As part of an investigation into the large-scale theft of property from interstate carriers in the Detroit area, the government obtained court authorization on March 2, 1973, to monitor a telephone used by petitioner Luna, who the government had probable cause to believe was involved in the theft operation (C.A. App. 34-39).[2] The government's wiretap application was supported by a 15-page affidavit of Special Agent Edward R. Schley of the F.B.I., who relied principally on information supplied by a confidential informant, "FBI-1" (C.A. App. 18-33).

On the day before trial was to have commenced, petitioners filed a motion to suppress all evidence derived from the interception, claiming that the identity of the informant had been discovered and that the informant denied giving the F.B.I. agents any information about petitioner Luna's involvement in the thefts. Attached to this motion was the affidavit of Steven Filkovich, who claimed to be the informant "FBI-1" (C.A. App. 43-46). After the government acknowledged that Filkovich was the confidential informant referred to in Agent Schley's affidavit, the district court conducted an evidentiary hearing on the motion, at which Filkovich and the F.B.I. agents involved in the investigation testified.[3]

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[2]"C.A. App." refers to the Appendix in the court of appeals, a copy of which is being lodged with the Clerk of this Court.

[3]The government did not object to the district court's decision to conduct this hearing. Thus, the questions whether a defendant is entitled to an evidentiary hearing to challenge the validity of a search warrant affidavit sufficient on its face and, if such a hearing may properly be held, what preliminary showing the defendant must make, are not presented here. See *Rugendorf* v. *United States*, 376 U.S. 528, 531-532.

Petitioner Luna had been mentioned in three portions of the wiretap affidavit, at pages 5, 8, and 11 (see Pet. App. B 39-40). Filkovich claimed at the hearing that the information attributed to him in the agent's affidavit was true, except for the mention of petitioner Luna's name (C.A. App. 66-73, 85, 92). F.B.I. Agents Schley and Bruce Masters testified, however, that the information in the affidavit regarding petitioner had been supplied to them by Filkovich (Pet. App. B 40-41; C.A. App. 145).

The district court recognized that the testimony concerning the statements about petitioner Luna on pages 5 and 11 of the wiretap affidavit was conflicting, but ruled that the credibility of Filkovich did not have to be determined "because the falsity of the page 8 statement stands undisputed by any evidence solicited at the hearing and itself renders the Schley affidavit fatally defective" (Pet. App. B 42). The court then suppressed all evidence gained through the wiretap, holding that without the statement on page 8 of the affidavit there was no probable cause to monitor petitioner Luna's telephone (Pet. App. B 43-44).[4]

The Sixth Circuit reversed the suppression order and remanded for further proceedings, stating that "we find a decided conflict between the testimony of Filkovich and that of the FBI agents" as to the statements about petitioner Luna on page 8 of the affidavit and that the district court had erred in failing to resolve the conflict (Pet. App. A 31).

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[4]Although the district court suppressed the wiretap evidence against petitioner Kopp as well as against petitioner Luna, petitioner Kopp was not the target of the wiretap and none of his conversations was intercepted. Hence, he lacks standing to contest admission of the evidence gained as a result of the interception. *Alderman* v. *United States*, 394 U.S. 165, 171-176.

2. Petitioners contend (Pet. 21-26) that the court of appeals exceeded its proper scope of review in vacating the district court's findings. However, these findings were clearly erroneous, because in making them the trial court apparently failed to consider testimony of one of the F.B.I. agents. When asked about the statement regarding petitioner Luna on page 8 of the affidavit, Agent Masters had testified at the suppression hearing that "[t]he information set out in the affidavit was information I obtained" from Filkovich (C.A. App. 111-112). Since the district court had stated that Filkovich's testimony to the contrary was "undisputed" (Pet. App. B 42), its findings based on the "undisputed" evidence were clearly in error and the court of appeals properly remanded for resolution of the conflicting testimony.[5]

Petitioners' claim (Pet. 23) that the district court implicitly resolved the conflict in testimony against the government and that the court's statement that there was "no evidence" (Pet. App. B 43) should be construed to mean that there was "no credible evidence" is unpersuasive. This strained interpretation is not supported by the district court's opinion, in which the court repeatedly stressed that the government had offered no evidence to contradict Filkovich's material testimony and that no issue of credibility therefore had to be determined (Pet. App. B 41-43). If the district court had merely

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[5]While this case was pending in the court of appeals, the government filed a motion for remand to the district court for further evidentiary proceedings, attaching an affidavit of Filkovich in which he affirmed that the information regarding petitioner Luna in the Schley affidavit attributed to him was accurate and stated that he had lied at the suppression hearing because he was in fear of his personal safety (see App., *infra*). The court of appeals declined to rule on this motion to reopen the record, but referred it to the district court for consideration on remand (Pet. App. A 31, n. 1).

disbelieved the government's evidence, it certainly would have included that express finding in its detailed discussion.[6]

3. Finally, petitioners contend (Pet. 9-20) that the court of appeals established an incorrect legal standard in advising the district court of the proper rule to apply if, after resolving the credibility question, the court finds that there were misrepresentations in the wiretap affidavit. However, the question raised by petitioners is not ripe for review by this Court because the absence of valid fact findings in the present record makes the issue "too remote and abstract an inquiry for the proper exercise of the judicial function." *International Longshoremen's and Warehousemen's Union, Local 37* v. *Boyd*, 347 U.S. 222, 224. See also *Brotherhood of Locomotive Firemen & Enginemen* v. *Bangor & Aroostook Railroad Co.*, 389 U.S. 327.

If, as is likely in view of the recent recantation by Filkovich, the district court concludes that there were no misrepresentations by the F.B.I. agents, then the issue of course need not be reached. See *United States* v. *Belculfine*, 395 F. Supp. 7, 8 (D. Mass.), affirmed, C.A. 1, No. 75-1213, decided December 30, 1975. If the district court finds that there were misrepresentations, then the record will present concrete facts and findings—especially as to the crucial issues of materiality and intent

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[6]In addition, the court of appeals mentioned two other significant errors in the district court's ruling that should be corrected on remand (Pet. App. A 37-38).

—fairly reviewable by the court of appeals rather than, as now, varying hypothetical fact patterns. (see Pet. 20).[7]

It is therefore respectfully submited that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

FEBRUARY 1976.

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[7] In each of the four court of appeals cases cited by petitioners as evidence of a "welter of decisional inconsistencies" (Pet. 13) among the circuits, as well as in the instant case, the court's discussion was far broader than that necessitated by the particular facts. This, rather than an irreconcilable conflict in theory, may in large measure explain the differing approaches to the problem of misrepresentations in search warrant affidavits.

APPENDIX

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,
APPELLANT,

Docket No. 75-1084

v.

GILBERT LUNA,
LARRY COBB, a/k/a LARRY KOPP,
FRANCISCO SOTELO, AND
PETER K. KOLLECK,
APPELLEES.

AFFIDAVIT

STEVEN D. J. FILKOVICH, being duly sworn, states:

1. I was called as a witness for the defense during a pretrial hearing in this criminal matter on February 20, 1974.

2. During my testimony at this hearing and while under oath, I was asked whether I had ever made a statement to Bruce Masters or Edward Schley of the Federal Bureau of Investigation that Hines had told me that Joe Tocco and Gilbert Luna provided the means of payment to the men performing certain thefts and whether Tocco and Luna received money and goods in exchange for such payment. I admitted having made a similar statement, but denied making such a statement specifically about Gilbert Luna.

3. I denied providing this information contained at page eight (8) of the Affidavit of Edward R. Schley.

dated March 2, 1973, at the said pretrial hearing because I was, at the time of my testimony, in the greatest fear for my personal safety were I to have testified truthfully under oath.

4. I have read the Affidavit of Edward R. Schley, dated March 2, 1973, and in particular the information attributed to me as FBI-1 on pages 5, 8 and 11 of the said Affidavit and affirm that I did provide this information to Edward R. Schley and that such information was truthful and a part of my personal knowledge.

/s/ STEVEN D. J. FILKOVICH

STEVEN D.J. FILKOVICH

Sworn and Subscribed to
before me this 29th day of September, 1975.

/s/ JOHN L. NEWCOMER

JOHN L. NEWCOMER, *Notary Public*
Oakland County, Michigan

My Commission expires: March 19, 1979.